Supreme Court, U.S.
FILED
APR 10 1998
CLERK

No. 97-1145

In the Supreme Court of the United States

OCTOBER TERM, 1997

HARRY F. CONNICK, PETITIONER

v.

UNITED STATES OF AMERICA, ON BEHALF OF THE ASSASSINATION RECORDS REVIEW BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1998

QUESTION PRESENTED

Whether the Attorney General, on behalf of the Assassination Records Review Board, may obtain by subpoena from the district attorney of New Orleans the original copies of the records of the district attorney relating to the assassination of President Kennedy, including that office's investigation and prosecution of Clay Shaw.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Burlington Northern R.R. v. *Office of Inspector General*, 983 F.2d 631 (5th Cir. 1993)	8
EEOC, In re, 709 F.2d 392 (5th Cir. 1983)	8-9
EEOC v. *Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991)	8
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501 (1943)	8
FTC v. *Carter*, 636 F.2d 781 (D.C. Cir. 1980)	8
FTC v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977)	8
Office of Inspector General, In re, 933 F.2d 276 (5th Cir. 1991)	8
United States v. *Aero Mayflower Transit Co.*, 831 F.2d 1142 (D.C. Cir. 1987)	8
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	8
United States v. *Powell*, 379 U.S. 48 (1964)	8
United States v. *Stuart*, 489 U.S. 353 (1989)	7-8

Statutes and regulation:

President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, §§ 1-14, 106 Stat. 3443-3458, as amended, Pub. L. No. 103-345, §§ 2-5, 108 Stat. 3128-3130	2
§ 3(2)	2, 9, 10
§ 3(2)(E)	2, 9

Statutes and regulation—Continued: Page

§ 3(2)(L) 2, 9
§ 3(5)(A) 3
§ 3(10) 3
§ 4(a)(1) 2
§ 4(b) 2
§ 7(a) 3
§ 7(i) 3, 11
§ 7(j) 11
§ 7(j)(1)(B) 3
§ 7(j)(1)(C)(i) 3, 11, 12
§ 7(j)(1)(C)(ii) 3, 11, 12
§ 7(j)(1)(C)(iii) 3, 5, 11, 12
§ 11(A) 14
44 U.S.C. 2107 note 2
Tucker Act, 28 U.S.C. 1491 14
36 C.F.R. 1400.7 (1996) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 124 F.3d 718. The opinion of the district court (Pet. App. 8-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1997. The petition for a writ of certiorari was filed on January 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress enacted the President John F. Kennedy Assassination Records Collection Act

of 1992 (the Act or the JFK Act).[1] Section 4(a)(1) of the Act requires the National Archives and Records Administration to "commence establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection." The Collection is to include "[a]ll assassination records." *Id.* § 4(b). Section 3(2) of the Act defines "assassination record" as:

> a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of —

any one of a number of entities, including the Warren Commission, the Rockefeller Commission on Central Intelligence Agency activity and "(E) the Select Committee on Assassinations (the 'House Assassinations Committee') of the House of Representatives." The definition also includes "(L) any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy." Congress defined the "public interest" being served to be the

> compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history

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[1] Pub. L. No. 102-526, §§ 1-14, 106 Stat. 3443-3458, as amended, Pub. L. No. 103-345, §§ 2-5, 108 Stat. 3128-3130, codified at 44 U.S.C. 2107 note. For ease of reference, all citations to the Act will be to the sections of the Public Law, which has been reproduced in the petition appendix. See Pet. App. 13-45.

> surrounding the assassination of President John F. Kennedy.

Id. § 3(10).

Section 7(a) establishes an independent agency within the Executive Branch known as the Assassination Records Review Board (Board) to manage the collection of documents within the scope of those sought to be preserved under the Act. The Board has the duty under Section 7(i) to "consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records." The Board also has a number of specified powers, including the authority to "direct Government offices to transmit to the Archivist assassination records as required under this Act," § 7(j)(1)(B), and to "obtain access to assassination records that have been identified and organized by a Government office," § 7(j)(1)(C)(i). The Act expressly defines the House Assassinations Committee (which is no longer in existence) as a "Government office." *Id.* § 3(5)(A). The Board also has the authority to:

> direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act.

§ 7(j)(1)(C)(ii). The Board is authorized to:

> request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act.

§ 7(j)(1)(C)(iii).

2. Petitioner, in his official capacity as the District Attorney for the Parish of Orleans, Louisiana, has for many years been in possession of records of the former Orleans Parish District Attorney, Jim Garrison, relating to Mr. Garrison's prosecution of Clay Shaw for his alleged participation in the assassination of President Kennedy. On March 20, 1978, petitioner made those records available for review by Martin J. Daly, an investigator for the Select Committee on Assassinations of the U.S. House of Representatives (House Assassinations Committee) pursuant to its congressionally-authorized investigation into the assassination of President Kennedy. Petitioner's chief investigator informed Mr. Daly that "he had in his office a (5) five drawer file cabinet containing papers, tapes, statements and interviews pertaining to the original investigation [of Clay Shaw]." U.S. R. E. No. 3, ¶ 5. Mr. Daly reviewed these files, copied 12 documents and brought them back to Washington, D.C. *Ibid.* Two other staff members of the House Assassinations Committee reviewed these same files in April or May 1978. *Id.* ¶¶ 6-7. Those staff members inspected the assassination records in petitioner's offices and made notes and indices of their contents. *Ibid.*, with exhibits.

In June 1995, the Board verified that petitioner still had the records that had been reviewed by the House Assassinations Committee. U.S. R. E. No. 1, ¶¶ 3-10. On June 27, 1995, the Review Board's representative, Thomas Samoluk, personally reviewed the same five file drawers of material, confirming that they appeared to be the same records reviewed by the House Assassinations Committee staff in 1978. *Id.* ¶¶ 9-10. At that time, petitioner assured Mr. Samoluk that he would donate the files to the JFK Assassination

Records Collection, with the exception of the grand jury records. *Id.* ¶ 7. However, between June 1995 and January 1996, the Review Board attempted, without success, to have petitioner produce the records. Connick R. E. No. 5, ¶ 16.

On January 29, 1996, at the request of the Board and pursuant to Section 7(j)(1)(C)(iii) of the Act, Assistant Attorney General Frank W. Hunger issued a subpoena duces tecum to petitioner, requiring him to appear and testify, under oath, regarding: "any records relating to the assassination of President John F. Kennedy, including, but not limited to, any records relating to the investigation and prosecution of Mr. Clay Shaw by the former New Orleans District Attorney, Jim Garrison." Pet. App. 5. The subpoena also required the production of:

> all documents and records in your possession, custody or control relating to the assassination of President John F. Kennedy, including, but not limited to handwritten notes, memoranda, drawings, photographs, tape recordings, and correspondence that relate to the investigation and prosecution of Mr. Clay Shaw by former New Orleans District Attorney, Jim Garrison, with the exception of any grand jury materials still extant in the possession of the District Attorney's Office.

Id. at 7.

3. On February 15, 1996, the day before its return date, petitioner filed a Motion to Quash the subpoena in the United States District Court for the Eastern District of Louisiana. On March 7, 1996, the United States filed a Petition for Summary Enforcement of Administrative Subpoena with that court. Those two matters were then consolidated. The district court

instructed petitioner to allow the Board to inspect the records that were the subject of the subpoena so that the Board could determine whether it needed the original records in petitioner's possession or whether copies would suffice. U.S. R. E. No. 5, at 1-2. After that inspection, the Board determined that the originals of all such records needed to be transferred to the National Archives to be preserved under the best archival conditions possible, because the conditions under which they were being stored in petitioner's possession put them at continuing risk of deterioration or damage. U.S. R. E. No. 6, at 4.[2]

The United States then renewed its motion for enforcement of the subpoena. U.S. R. E. Nos. 4-5. On June 25, 1996, the district court issued an order and judgment, granting the government's petition to enforce the subpoena in part. Pet. App. 8-9. The court

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[2] Two representatives of the Board inspected the records in New Orleans on April 26, 1996. U.S. R. E. No. 6. Those two representatives, both highly qualified archivists and historians (see *id.* ¶¶ 1-11), presented three reasons why the records should be turned over to the Board as soon as possible. First, the order of the records had been seriously disturbed since the 1978 inspection by the House Assassinations Committee, and even since June 1995, making it difficult to determine whether records had been lost, removed or filed indifferently. *Id.* ¶ 15.a. Second, only three-and-one-half file drawers were produced, not five, which further raised the question whether some records may now be missing. *Id.* ¶ 15.b. Third, the audio tapes had not been stored under appropriate archival conditions, making it likely that further deterioration in those valuable artifacts would occur. *Id.* ¶ 15.c. The Board representatives recommended that those records be processed by an archival facility that is equipped to deal with them, *id.* ¶ 16, and stated that there is no facility in the United States better equipped to carry out that task than the National Archives. *Id.* ¶ 17.

ordered petitioner to "turn over to the [United States] the originals of all records in his possession that are described in the Administrative Subpoena * * *; PROVIDED, HOWEVER, that [the United States] shall make clear and legible copies of each record * * * and provide such copies to [petitioner]." *Id.* at 9.

4. The court of appeals affirmed. Pet. App. 1-4. First, the court of appeals held that the records "are assassination records within the meaning and intendment of the Act" because they "indisputably are related to the assassination of President Kennedy" and because "a representative of the Select Committee on Assassinations traveled to New Orleans in 1978 and, with the consent of [petitioner], inspected, indexed, and photocopied portions of those records." *Id.* at 3. Next, the court of appeals held that petitioner "holds a government office within the intendment of the Act" because the Board's regulations define "government office" to include state and local government. *Ibid.* (citing 36 C.F.R. 1400.7 (1996)). Thus, the court held, petitioner "is obligated to transfer all assassination records in his possession to the National Archives." Pet. App. 3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the issue raised here has never before been presented in any litigation.

1. This case involves an attempt to enforce an administrative subpoena. The scope of a district court's inquiry in a proceeding to enforce an administrative subpoena is limited. *United States* v. *Stuart*,

489 U.S. 353, 359-360 (1989); *EEOC* v. *Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991); *In re Office of Inspector General*, 933 F.2d 276, 277 (5th Cir. 1991). Though the test for enforcement has been phrased in various ways, the requirements to justify judicial enforcement of an administrative subpoena are "minimal," *e.g.*, *Burlington Northern R.R.* v. *Office of Inspector General*, 983 F.2d 631, 637 (5th Cir. 1993), and the proceedings are summary in nature, *United States* v. *Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145-1147 (D.C. Cir. 1987). The district court's inquiry is essentially limited to three broad questions: (1) whether the records investigation is for a proper statutory purpose; (2) whether the documents the agency seeks are relevant to the records investigation; and (3) whether the demand for documents is unreasonably broad or burdensome. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *Burlington Northern*, 983 F.2d at 637-638. A district court must enforce a federal agency's investigative subpoena if it is "not plainly incompetent or irrelevant to any lawful purpose of the [agency]," *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).[3] If the government agency satisfies that "minimal" standard, the burden then shifts to the subpoenaed party to make "a *substantial* demonstration * * * based on *meaningful* evidence" that the Court's process would be abused by enforcement. *In re EEOC*,

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[3] Moreover, the agency's own appraisal of relevancy must be accepted so long as it is not "obviously wrong." *FTC* v. *Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (quoting *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 877 n.32 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977)).

709 F.2d 392, 400 (5th Cir. 1983). Because petitioner failed to meet that "heavy" burden, *ibid.*, the district court properly ordered the subpoena enforced.

Petitioner has not raised any dispute over whether the Shaw file is relevant to the Board's investigation or whether the subpoena is unreasonably broad or unduly burdensome. The only dispute is over legal issues, such as (1) whether the subpoenaed records are "assassination records," and thus come within the scope of the JFK Act, and (2) whether, in seeking those records by subpoena, the Board was pursuing a proper statutory purpose. On both questions, the Board's position is correct.

a. The Act defines "assassination records" as including "a record that is related to the assassination of President John F. Kennedy, that was created or *made available for use by*" various entities, specifically including the House Assassinations Committee. JFK Act § 3(2) (emphasis added). Petitioner does not dispute that in 1978, staff members of that Committee inspected the entire Shaw file in petitioner's office, made copies of at least 12 documents, and made notes from and indices of the remainder of those records. Accordingly, under Section 3(2)(E) of the Act, the records constitute "assassination records" because they were "made available for use by" the House Assassinations Committee. Alternatively, the JFK Act also defines an "assassination record" as a record created by "any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy." § 3(2)(L). Under that definition, the subpoenaed records also qualify as "assassination records" because petitioner's decision

to allow the House Assassination Committee investigators to study the file constituted "support or assistance" to the Committee's inquiry.

Petitioner objects, however, that the Shaw file was not created for any federal purpose, and thus ought to be excluded from the definition of "assassination record." Pet. 12-14. That argument misreads the language of the Act. The definition in Section 3(2) includes in the alternative both those records "created" by one of the named entities and those "made available for use by" them. Just because Jim Garrison created the file years earlier during his prosecution of Clay Shaw does not preclude it from meeting the statutory definition of "assassination record" when petitioner subsequently made those files "available for use by" the House investigators who reviewed that file as part of their investigation. Nor is there any merit to petitioner's alternative argument that the House Assassinations Committee's interaction with the file was somehow not sufficiently significant to constitute making the file "available for use by" that Committee. It is immaterial that the House investigators copied only 12 pages of the file, because they examined the entire file, made notes, and prepared indices of the file. As a result, any effort to identify all of the documents that were part of the House investigation must include that file. Congress deliberately chose to enact a broad definition of "assassination record" that includes documents reviewed by the listed entities (such as the Committee) from the files of other persons or institutions. Such documents are no less a part of the historical record of the Kennedy assassination and its investigations than are the docu-

ments created or retained by the listed offices themselves.

b. It follows from the conclusion that the Shaw file is an "assassination record" that the Board has the authority to obtain that file from petitioner through an administrative subpoena. The Board is authorized to "request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act." § 7(j)(1)(C)(iii). Petitioner contends (Pet. 14) that the Board is given only a "singular responsibility" under the Act, namely the duty under Section 7(i) to "consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records." But in addition to that duty, the Act gives the Board certain other powers in Section 7(j) that also come within its "responsibilities" for purposes of the statutory subpoena authority. Those powers include the authority to "obtain access to assassination records that have been identified and organized by a Government office." § 7(j)(1)(C)(i). The Board also has the authority to "direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." § 7(j)(1)(C)(ii).

Taken together, and read in conjunction with the subpoena power, those responsibilities amply support the Board's demand for the Shaw file. Even though that file was not in the possession of the House Assassinations Committee, it is an "assassination record[] that ha[s] been identified and organized" by

the Committee under Section 7(j)(1)(C)(i). Again, the full contents of the Shaw file were studied and indexed by the Committee as part of its investigation. The file thus can reveal important information about the House Assassinations Committee's investigation, illuminating the nature of its attempts to deal with the validity or lack thereof of the prosecution of Clay Shaw. The Board thus has the authority to "obtain access to" that file under Section 7(j)(1)(C)(i) so that it can be placed in the Archives collection, both for easy public access and for safekeeping, as a record of the House Assassinations Committee investigation. Since it is not currently within the possession of the House Assassinations Committee, the Board also has the power under Section 7(j)(1)(C)(ii) to "investigate the facts surrounding" the file, since that file constitutes "additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." That language contemplates that the task of assembling and transmitting all assassination records to the Archives may well involve persons and documents that are not currently within the possession of one of the named agencies. The subpoena power under Section 7(j)(1)(C)(iii) provides an essential tool for that investigation: compulsory process, which this subsection expressly makes available for use against "private persons" to obtain both testimony and records. The Board thus has statutory authority to require petitioner to provide records in his custody to the Board.

2. The court of appeals did not reach the second of those two questions, *i.e.*, whether the Board's subpoena properly serves to fulfill its responsibilities.

Instead, the court first found that the Shaw file constitutes an assassination record and then held that petitioner has a statutory responsibility to transmit the file to the Archives, independent of the Board's subpoena. Pet. App. 3. It reached that conclusion on the ground that the Orleans Parish District Attorney's office is a "Government office" within the terms of the Act. The United States did not rely on that argument before the district court or the court of appeals. There is no need to consider here whether the court of appeals' rationale on that point was sound, however, because the court of appeals' judgment was correct for the alternative reasons that we have outlined in this brief.

3. Petitioner objects to the district court's order requiring him to surrender the original of the subpoenaed file, with the United States having the obligation to make copies of each item and return the copies to petitioner. Petitioner asserts that this requirement exceeds the scope of ordinary subpoena practice and constitutes an unconstitutional taking. Both contentions are incorrect.

The record placed before the district court shows that there is good reason to insist that the originals be immediately provided to the Board. In 1996, two experts re-examined the file on behalf of the Board, and their uncontradicted opinions are that petitioner appears to be taking insufficient steps to preserve and safeguard the file. As they explained, the contents of the file are in a different sequence than when the House Assassinations Committee or earlier Board representatives examined it, one-and-one-half of the five drawers of material appear to be missing, and the audio tapes have not been properly stored to avoid damage. See U.S. R. E. No. 6. Under such circum-

stances, it is important for the Board to obtain the originals and to have experienced professional archivists make any copies. After the experts rendered those opinions, the district court ordered petitioner to surrender the originals. Petitioner fails to show why that requirement was reversible error.

With respect to petitioner's takings argument, that issue is not properly presented in this case. If the subpoena or its underlying statute constitute a taking, then petitioner's sole remedy would be to bring a claim for just compensation against the United States under the Tucker Act, 28 U.S.C. 1491. Congress did not intend the purposes of the JFK Act to be frustrated through reliance on property rights when it required, or otherwise authorized, the acquisition and transmittal of assassination records to the Archives. See § 11(a). If the statutory requirement that persons relinquish custody of assassination records of the Board constitutes a taking of compensable property rights, petitioner's remedy lies elsewhere; it would not permit him to resist this subpoena.

4. At any rate, the issues raised by the petition do not merit this Court's attention. They raise a unique situation, unlikely ever to arise again. There is a finite amount of Kennedy assassination records, and the Board is well on its way toward completing the task of assembling those records in the Archives. Jim Garrison's investigation and prosecution of Clay Shaw for the assassination was a singular event, unlike any other of the limited number of state and local investigations. While there may be a few additional efforts to obtain state and local law enforcement files, it is impossible to know whether any future litigation will raise similar issues. Given that

uncertainty, and the absence of any conflict among the courts of appeals on the issues presented in the petition, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1998